FILE COPY

Office - Supreme Court, U.S.
FILED
JAN 8 1947
CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

October Term, 1946

No. 715

STATE OF OKLAHOMA and
CHAMPLIN REFINING COMPANY,
Petitioners,
VERSUS
UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE RESPONSE TO BRIEF FOR THE UNITED STATES AND RESPONSE TO BRIEF OF THE UNITED STATES

MAC Q. WILLIAMSON,
Attorney General for the State of Oklahoma;
J. WALKER FIELD,
Assistant Attorney General, State of Oklahoma;
WALTER MARLIN,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;
Oklahoma City, Oklahoma
HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Enid, Oklahoma,
Attorneys for Champlin Refining Company.

January, 1947

INDEX

PAGE

Motion for Leave to File Response to Brief for the United States 1

Response to Brief of the United States 3

TABLE OF CASES

Brewer-Elliott Oil & Gas Company v. United States, 260 U.S. 77 6

Brewer-Elliott Oil & Gas Company v. United States, (C.C.A. 8) 270 Fed. 100 7

City of Tulsa v. Commissioners of the Land Office, 101 Pac. (2d) 246 8

City of Tulsa v. Peacock, 74 Pac. (2d) 359 8

Dana v. Hurst, 86 Kan. 947 8

Jackson-Walker Coal and Material Company v. Hodges, 283 Fed. 457 8

Oklahoma v. Texas, 258 U.S. 574 9

Shore v. Shell Petroleum Corporation, 55 Fed. (2d) 696, 60 Fed. (2d) 1 8

State v. Nolegs, 40 Okla. 479 ..... 7, 11

United States v. Holt State Bank, 294 Fed. 165, 270 U.S. 55 9

United States v. Mackey, 214 Fed. 137 8

Vickery v. Yahola Sand & Gravel Company, 158 Okla. 120 ..... 1, 3

Wear v. Kansas, 245 U.S. 154 8

TABLE OF STATUTES

Okla. Stats. 1941, Title 64, Sec. 290 ..... 8, 9

Okla. Stats. 1941, Title 64, Sec. 290 7

Conclusion 12

Supreme Court of the United States

October Term, 1946

No. 715

STATE OF OKLAHOMA and
CHAMPLIN REFINING COMPANY,
Petitioners,

VERSUS

UNITED STATES OF AMERICA.

MOTION FOR LEAVE TO FILE RESPONSE TO BRIEF FOR THE UNITED STATES

The Petitioners assert that the Brief of the United States in opposition to the Petition for Writ of Certiorari fails to give proper analysis to the decision of the Oklahoma Supreme Court in *Vickery* v. *Yohola Sand and Gravel Co.*, 158 Okla. 120, 12 Pac.(2d) 882, while attempting to invoke that decision as authority for the statement (Brief, Page 14) that:

> "The *Nolegs* decision has not been regarded as sound since this Court rejected it, in 1922, * * *"

and that:

> "The Supreme Court of Oklahoma acknowledged as much in 1932" (Brief, Page 14).

That inasmuch as petitioners did not cite nor discuss the *Vickery case, supra,* in their brief in support of the Petition for Writ of Certiorari and since a misinterpretation of that decision is indulged by counsel for the United States in their opposition brief, petitioners respectfully ask that they be permitted to file the attached brief for response to the Brief of the United States so that the respective positions of the parties in this important litigation shall be clearly before the Court.

WHEREFORE, the petitioners respectfully pray that the order of the Court be entered granting petitioners the right to file brief hereto attached.

MAC Q. WILLIAMSON,
Attorney General for the State of Oklahoma;

J. WALKER FIELD,
Assistant Attorney General, State of Oklahoma;

WALTER MARLIN,
Counsel for the Commissioners of the Land Office of the State of Oklahoma;
Oklahoma City, Oklahoma

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Enid, Oklahoma,
Attorneys for Champlin Refining Company.

Supreme Court of the United States

October Term, 1946

No. 715

STATE OF OKLAHOMA and
CHAMPLIN REFINING COMPANY,
Petitioners,

VERSUS

UNITED STATES OF AMERICA.

RESPONSE TO BRIEF OF THE UNITED STATES

I.

The Oklahoma Supreme Court in *Vickery* v. *Yohola Sand & Gravel Co.*, 158 Okla. 120, expressly reaffirmed the *Nolegs* decision by the use of the following language which appears at Page 122 of 158 Oklahoma:

> "It will be observed that the general rule announced in the Nolegs case to the effect that the ownership of the navigable waters and the soil under them within the present boundaries of the State of Oklahoma is in the State, as announced by the District Court in the Brewer-Elliott case, supra, that 'a State takes title

to the bed of navigable streams in its borders, and, subject to the paramount authority of Congress to control navigation in the regulation of interstate and foreign commerce, may appropriate and dispose of minerals found in the beds of such streams, *has never been repudiated or disputed* in any of the cases cited, except perhaps to say that Congress had the power before Statehood to convey by grant any of such lands, whenever it became necessary to do so in order to perform international obligations, or to effect the improvement of such lands for the promotion and convenience of commerce with foreign nations and among the several States, or to carry out other public purposes appropriate to the objects for which the United States holds the territory." (Emphasis will be ours throughout, unless otherwise noted.)

The respondent has, in our opinion, misconstrued the language which appears on Page 121 of the opinion in the *Vickery case, supra*, in which Justice Riley, speaking for the Court, said:

> "* * * the Federal courts refused to follow the *Nolegs case;*"

which statement is followed by the dictum:

> "This is undoubtedly true as to the holding that the court takes judicial notice that the Arkansas River is navigable through its course in Oklahoma."

The respondent failed to note that the Court then shows that each of the Federal cases referred to involved an *express grant* of a portion of the bed to certain Indian Tribes and that the Court concludes this phase of its opinion with the paragraph quoted above in which it is clearly stated that the *Nolegs* decision has never been repudiated, but that it simply does not apply to the portions

of the river *bed* which the Federal Government *expressly granted* to Indians prior to Statehood. The Court merely meant therefore that the Oklahoma rule of navigability does not cover the *entire length* of the river within the State, because the rule is subject to the prior rights of Federal grantees who received *express* grants covering portions of the river bed.

In addition to being dictum, the language referred to by the respondent represented the view of the learned Justice who wrote the opinion as to the effect of the Federal decisions upon the Oklahoma rule of navigability. As those cases involve the construction of Federal grants, the only court which can give an authoritative appraisal of the effect of such cases on the Oklahoma rule of navigability is the Supreme Court of the United States, and it is for this Court to say whether the appraisal made in the above cited dictum is correct or incorrect.

The respondent can gain little comfort from the decision itself, for the Oklahoma Supreme Court in the *Vickery case, supra*, held that the State of Oklahoma owned the bed of the Arkansas River at the location there in controversy. However, the portion of the river which was involved in that case was admittedly navigable in fact and the decision is therefore not applicable to the question here. By the same token, the remarks of Justice Riley with reference to the portion of the stream which does not meet the Federal test of navigability was not necessary to the decision

and hence represented only a personal opinion, and is purest dictum.

It may be stated further that the *Nolegs* decision is an issue, in the cases recently argued and submitted and now awaiting decision in the Oklahoma Supreme Court, which pending cases involve the same river bed in controversy in the case at bar. Petitioners submit that the Oklahoma Supreme Court should be accorded the privilege of stating in those cases it position upon the question of State law involved in the *Nolegs* decision, but we earnestly request that the Supreme Court of the United States make an authoritative declaration in the present action as to the Federal law governing all of the pending cases.

II.

The respondent's statement that the United States Supreme Court has "rejected" the *Nolegs* decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, 260 U.S. 77, brings into sharp relief the extent to which the respondent is asking this Court to go in encroaching upon privileges which have heretofore been reserved to the states.

This Court did not "reject" the *Nolegs* decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, *supra*, but merely declined to apply it in a case where the Federal government had *expressly granted* a portion of the *river bed* to the Osage Indian Tribe prior to Statehood.

This Court was careful to explain in the *Brewer-Elliott* opinion, *supra*, that a state has the right to exclude riparian owners from ownership of the beds of streams by declaring them to be navigable even if they are "not actually so," excepting only in cases where the riparian owners of the bed had received vested rights prior to Statehood, as by express grant from the Federal government.

The Circuit Court of Appeals for the Eighth Circuit, in its decision in *Brewer-Elliott Oil and Gas Company* v. *United States*, 270 Fed. 100, recognized that the "established rule" (Page 103) was that state laws govern the extent of riparian rights which attach to Federal patents, but went on to state that there is an "exception" (Page 104) to this established rule, to-wit: that a state cannot enforce a rule of navigability contrary to the fact against an express grantee of the Federal government.

The Oklahoma Supreme Court did not therefore mean that the *Nolegs case* is no longer the law in Oklahoma. The opinion merely holds that the Oklahoma rule of navigability of the river is subject to the prior rights of *express* Federal grantees.

Subject to that well-recognized exception, the established law of Oklahoma, beyond question, is that the Arkansas River is navigable for the purpose of defining the riparian titles of private owners of the shore lands. This is shown (1) by the *Nolegs* decision, *supra*, itself, which has never been reversed or modified; (2) by the fact

that the *Nolegs* decision, *supra*, has been reinforced by a State statute (Okla. Stat. 1941, Title 64, Section 290); and (3) by the fact that the Supreme Court of Oklahoma has assumed, in two recent cases, that the title to the Arkansas River is in the State of Oklahoma [*City of Tulsa* v. *Commissioners of the Land Office*, 101 Pac.(2d) 246; *City of Tulsa* v. *Peacock*, 74 Pac.(2d) 359]. Moreover, the Commissioners of the Land Office of the State of Oklahoma, complying with the State's policy expressed in the *Nolegs case*, *supra*, and the statute above referred to, have asserted title to the bed of the Arkansas River at the location here in controversy and have leased the same for development of oil and gas for the benefit of the people of the State of Oklahoma.

Furthermore, the Supreme Court of Oklahoma, in declaring the river to be navigable, had the same circumstances in favor of its decision, which the Supreme Court of the United States held to be "in favor" of the decision of the Kansas Supreme Court in *Wear* v. *Kansas*, 245 U.S. 154, to-wit: That the river was meandered in the original surveys;[1] that the Arkansas River had previously been held to be navigable both in Oklahoma[2] and Kansas.[3]

1. Only navigable streams are authorized by the Federal Statutes to be meandered. Title 43 U.S.C.A. Sec. 751.
2. *United States* v. *Mackey*, 214 Fed. 137.
3. *Dana* v. *Hurst*, 86 Kan. 947. This case was later followed by the Federal Courts in Kansas in *Jackson-Walker Coal & Material Company* v. *Hodges*, 283 Fed. 457 and *Shore* v. *Shell Petroleum Corporation*, 55 Fed.(2d) 696, affirmed by Circuit Court of Appeals, 10th Circuit, 60 Fed.(2d) 1.

and that the later legislation of the State supported the decision.[4]

The same Circuit Court, in fact, referred to its *Brewer-Elliott* opinion as stating an exception to the established rule in *United States* v. *Holt State Bank*, 294 Fed. 165 (affirmed by this Court in 270 U.S. 55). The Circuit Court said:

> "* * * (4) moreover, since the settled law has become that the rights and interests of riparian owners on the shores of lakes and rivers to the lands under the waters upon which they border are determinable by the law of the state in which the lands lie, and since such rights and interests are often conditioned by the navigability of such waters, it logically follows, and has long since become the law of the land, *with some exceptions not material in the consideration of this case* [*Brewer-Elliott Oil and Gas Co.* v. *U.S.* (C.C.A.) 270 Fed. 100, 107, 109], that in the determination of the rights of riparian owners to the lands under the water upon which their lands border, *what shall be deemed a navigable water must be determined by the law of the state in which the riparian lands lie.*"

The respondent rests its entire case largely upon another decision which involved the exception to the established rule, to-wit: *Oklahoma* v. *Texas*, 258 U.S. 574.

In that case the Federal government, prior to Statehood, had *expressly conveyed* to the Kiowa, Comanche and Apache Tribes of Indians the north half of the Red River (258 U.S. at Page 592) and the United States chose to retain and assert title to the remaining or south half of the river (258 U.S. at Page 583).

4. Okla. Stats. 1941, Title 64, Sec. 290.

Thus the rights of the Indians had vested in the north half of the river bed by an express grant prior to statehood, and this Court applied the exception to the "established rule" for that reason. Since the construction of an express Federal grant was involved in that case, this Court held that the Oklahoma rule of navigability contrary to the fact could not be applied, and that for the purpose of that case, the river was non-navigable. Hence the Court, in determining the riparian rights attaching to the express Federal grants in that case, applied the Oklahoma law with reference to non-navigable streams, which happened to be the common law.

It is worthy of note, however, that this Court limited the title of the Indians to that part of the river to which they had received an express grant (258 U.S. at Page 592) and declined to extend their ownership of the river bed beyond the limits of their express grant.

Although the respondent cites only cases in which this Court applied the exception to the established rule, it would seek to have this Court hold that the right of the State of Oklahoma to determine the riparian rights of its citizens along the Arkansas river is forfeited in all cases, merely because this Court found that the Oklahoma rule of navigability could not *be enforced against an express grant of the Federal government*. It is this contention which would inflict great and manifest injury upon this state, and this is one of the principal reasons why we

earnestly believe that *certiorari* should be granted in the present case.

III.

We agree with the respondent, as stated on Page 2 of its brief, that the question presented in this case is whether the Oklahoma Territorial Legislature had the power, by adopting the common law in the Territory, to "vest" the riparian owners with title to the river bed.

We again assert that this question has already been decided by this Court in *Wear* v. *Kansas*, 245 U.S. 154.

The respondent states on Page 16 of its brief that the decision in *Wear* v. *Kansas*, *supra*, merely held that it was not error for the Supreme Court of Kansas to take judicial notice that the Kansas River was navigable. *This is exactly what the* Supreme Court of Oklahoma did in *State* v. *Nolegs*, 40 Okla. 479, *in a case in which the essential circumstances were identical with those in the Kansas case.* The respondent states that in *Wear* v. *Kansas*, *supra*, the navigability of the river was admitted in the pleadings, but as this Court stated in its opinion (245 U.S. at Page 158), at least one of the riparian owners denied the navigability of the river and thus put that fact squarely in issue in the case.

If the Supreme Court of Kansas was held to be entitled to take judicial notice of the navigability of the Kansas River, how can it be held that the Supreme Court of Okla-

homa under identical circumstances shall be held not entitled to take judicial notice of the navigability of the Arkansas River? We have searched the respondents' brief carefully but in vain for their answer or for any legal or logical reasoning which would support the denial to Oklahoma of that which the Courts have so fully and firmly extended to Kansas. This same ominous silence upon this important point is noted in the opinion of the Tenth Circuit Court herein and in its summary denial of this precise question as submitted in our petition for rehearing.

CONCLUSION

We most earnestly repeat that such unequal treatment of the State of Oklahoma in contradistinction to the treatment which has been heretofore accorded the State of Kansas, marks departure from the established decisions of both the United States Supreme Court and the Supreme Court of Oklahoma which requires a review of the present case by this Court, and we most earnestly petition this Court that a Writ of Certiorari be granted and that upon final review the threatened inequality about to become final against the people of the State of Oklahoma, be corrected and that the decision of the Circuit Court of Appeals be reversed, and that the State of Oklahoma be granted such other and further relief as shall be found to be proper and just.

Respectfully submitted,

MAC Q. WILLIAMSON,
Attorney General for the
State of Oklahoma;

J. WALKER FIELD,
Assistant Attorney General,
State of Oklahoma;

WALTER MARLIN,
Counsel for the Commissioners
of the Land Office of the
State of Oklahoma;
Oklahoma City, Oklahoma

HARRY O. GLASSER,
NATHAN SCARRITT,
E. S. CHAMPLIN,
Enid, Oklahoma,
Attorneys for Champlin
Refining Company.

January, 1947